Filed 12/12/01

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. EDWARD GLEN FRY, Defendant and Appellant.	E027550 (Super.Ct.No. FWV16514) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Dennis G. Cole, Judge. Affirmed with directions.

Stephen S. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Janelle Boustany, Supervising Deputy Attorney General, and Arlene Aquintey Sevidal, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Edward Glen Fry appeals after he was convicted of first degree burglary, receiving stolen property and petty theft with a prior theft conviction. He

contends that his convictions should be reversed (1) because of prosecutorial misconduct, (2) because his attorney was incompetent, and (3) because defendant and his attorney were not afforded the opportunity to be present at a hearing conducted during deliberations. He further argues that the court abused its discretion in failing to strike one or more of defendant's strike priors, that his conviction of receiving stolen property was improper, and that his sentence was improper. With the exception of a minor sentencing matter, we find defendant's contentions to be without merit.

FACTS AND PROCEDURAL HISTORY

On September 23, 1998, Melody Lark, the victim, lived in a townhouse in Ontario. That afternoon, a neighbor in the same townhouse complex heard a loud sound of glass crashing, and felt the building shake. The neighbor looked outside, thinking at first that there had been a car accident. The neighbor noticed there was no reflection from the sliding door area of Lark's townhouse, and saw the blinds fluttering, as if something or someone had passed through. The neighbor called police.

Officers of the Ontario Police Department responded to the scene. The officers who arrived first noticed that the front door of Lark's townhouse appeared to have been broken in. They heard noises from the interior of the residence as they approached. While the officers waited for backup, defendant opened the front door, saw the officers, and immediately slammed the door shut, retreating through the home. He ran out the sliding patio door area, jumped onto a fence, and climbed onto the roof. Law enforcement officers eventually persuaded defendant to surrender himself, and he was taken into custody.

Defendant had several of Lark's credit cards in a plastic baggie in his pants pocket when he was taken into custody. He also had a backpack with him. Police found Lark's radio in the backpack. Once defendant had been arrested, officers checked the townhouse for other suspects. They found numerous items of the victim's property, such as VCR players, another radio, and a purple jacket, stacked downstairs. Some of the items had been placed in a trash bag or pillow case. In Lark's bedroom, her television set had been taken off its stand and placed on the bed.

Defendant was charged by information with one count of first degree residential burglary. As to the burglary count, the information alleged that defendant had three serious felony (strike) priors: a 1993 attempted burglary conviction, a 1994 first degree burglary conviction, and a 1995 first degree burglary conviction. The information further alleged that defendant was subject to a five-year prior serious felony enhancement[1] for each of the 1994 and 1995 burglary convictions, as well as a one-year prior prison term enhancement[2] for each of the 1994 and 1995 burglary convictions, plus two additional prior prison term enhancements for other convictions.

The information also charged defendant with one count of receiving stolen property, and one count of petty theft with a prior theft conviction.

Jury trial commenced on April 10, 2000. Defendant's defense was that he suffered from Post Traumatic Stress Disorder (PTSD) as a result of his combat experiences in the

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[1] Penal Code section 667, subdivision (a)(1).

Persian Gulf War, and that he committed the crimes in an irrational state of mind following a PTSD episode.

The jury found defendant guilty on all charges, and made true findings as to all the charged enhancements.

Defendant now appeals.

ANALYSIS

I. The Alleged Failure to Produce Defendant's Backpack Until Trial Was Not Prejudicial

Defense counsel moved pretrial for discovery of all the physical evidence in the case held by police.[3] Notwithstanding the defense request, the prosecutor failed to deliver defendant's backpack, seized from his person at the time of his arrest, until the second day of trial.

Defendant now contends that the failure to produce the backpack earlier caused him "immense" prejudice. Defendant's personal property was inside the backpack, including phone books, bus route schedules, a motel receipt, business cards, and a letter from the Social Security Administration. Defendant now speculates that, had his attorney had possession of these items earlier, he somehow could have made a more convincing case of defendant's "desperate situation," which would in turn have lent some corroboration to Dr. Lantz's theory that defendant had "snapped" under difficult circumstances.

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[2] Penal Code section 667.5, subdivision (b).

No reversal is required. First, defendant never objected below on the grounds of alleged discovery violation. The backpack was given to a defense investigator the day after it was requested. Defendant never indicated that he needed more time to examine the backpack and its contents. He never asked for a continuance or any other sanction for alleged discovery violation. He waived the issue on appeal.[4]

Second, under Penal Code section 1054.1, subdivision (e), the prosecutor is required to disclose only "exculpatory" evidence. Defendant's backpack and its contents were not "exculpatory": Its corroborative value under the defense theory was extremely limited, and certainly did not indicate that "the defendant is free from guilt" or that he is "in fact innocent of the charged crime."[5]

Third, defendant himself at all times knew of the existence of the backpack and its contents. He was not denied access to exculpatory evidence within the exclusive knowledge of the government; there was no "suppression" of exculpatory matters known only to the People.[6]

Fourth, to the extent that defendant now also objects that the contents of the backpack should not have been admitted at trial, we can perceive no possible prejudice. The

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[3] Penal Code section 1054.1, subdivision (e).

[4] Cf. *Zamudio v. City and County of San Francisco* (1999) 70 Cal.App.4th 445, 454.

[5] *People v. Santos* (1994) 30 Cal.App.4th 169, 178.

[6] *People v. Carpenter* (1997) 15 Cal.4th 312, 411.

exculpatory value of the evidence was tangential and speculative only; on the other hand, neither was it very inculpatory. It is not reasonably probable that a different result would have obtained had the evidence not been admitted.[7]

II. Defense Counsel Was Not Constitutionally Ineffective

Defendant presents three matters as to which he alleges his trial counsel performed less than adequately.

A. Standard of Review

In order to prevail on a claim that his counsel was ineffective, the defendant on appeal must show not only that counsel's performance was deficient, measured by an objective standard, but also that there is a reasonable probability that, but for counsel's errors, the result would have been more favorable.[8] We analyze counsel's asserted deficiencies under this standard; if defendant's showing as to either prong is inadequate, the claim must fail.[9]

B. Defense Counsel's Examination of the Expert Witness Was Not Ineffective

Defendant presented the testimony of an expert witness, Dr. Lantz, to the effect that defendant suffered from PTSD as a result of his combat experiences in the Persian Gulf War. Dr. Lantz testified, among other things, that defendant's PTSD rendered him "more susceptible to stress," that at the time of the offense defendant was under significant stress

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[7] *People* v. *Watson* (1956) 46 Cal.2d 818, 836.
[8] *People v. Ochoa* (1998) 19 Cal.4th 353, 414-415.

because, after his release from prison 10 days earlier, he had not yet succeeded in finding a job, he had run out of money, his family did not take him in, and he had been sleeping on the streets for approximately four days. "So," Dr. Lantz testified, "he snaps."

Defendant is now critical of counsel's performance in examining Dr. Lantz. He urges that the testimony trial counsel elicited from Dr. Lantz was not adequate to explain to the jury that defendant's illness—PTSD—"could leave him unable to form certain mental states because of his cognitive disorder, mental disease, or defect." He claims that, although trial counsel elicited general testimony on defendant's background, but "never asked his own expert witness whether someone with [PTSD] was able to make certain conclusions because of a cognitive disorder, mental disease or defect as authorized by the court."

We disagree. As defendant himself acknowledges, Dr. Lantz (1) generally described PTSD, (2) outlined the measures he took to evaluate defendant, including testing and review of defendant's military records, (3) opined that defendant suffered from PTSD, (4) testified that PTSD results in organic brain dysfunction, (5) described circumstances -- stress -- which could trigger an episode, (6) indicated that defendant suffered from this organic brain condition on the date of the crime, because of the stressors to which he had been subjected, and (7) gave several specific opinions about what happened on the date of the crime. He

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9 *In re Jackson* (1992) 3 Cal.4th 578, 604, citing *Strickland* v. *Washington* (1984)

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testified that defendant "snapped," that defendant's "ability to think, to plan, to really know what he was doing really was markedly impaired at that point," that defendant "was acting on impulse," that he "had a complete loss of judgment," that he "wasn't thinking; he just acted," and that defendant did not "even really remember half the stuff that he did." Defendant was, according to Dr. Lantz, "unable to think, unable to plan and he was really unable to appreciate what he was doing. . . . He just simply just snapped." Further, defendant's behavior "was the "product of a complete breakdown and a loss of any type of rational thought." On September 23, the knowledge of right and wrong was "unavailable" to defendant, under the mental state he was in at the time.

We can hardly imagine how Dr. Lantz's opinion could have been more clear, that defendant suffered from a recognized disease, syndrome or mental defect, that the disease, syndrome or mental defect affected defendant's organic brain functioning, that defendant was under circumstances which triggered an episode affecting his brain, and that, at the time of the crime, he did not have the actual intent required to commit the crime. The expert's testimony was sufficient to place before the jury the question of defendant's actual formation of a specific intent to steal. Counsel's performance was professionally competent.

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466 U.S. 668, 697 [104 S.Ct. 2052, 80 L.Ed.2d 674, 699-700].

C. Counsel's Cross-Examination of Officer Jones Was Not Prejudicial

Defendant next attacks counsel's performance with respect to cross-examination of one of the investigating officers. Defendant complains that counsel's cross-examination did little but "replay" for the jury the officer's direct examination testimony, with the added fillips that the officer had noticed blood on a branch near the broken glass door, and the officer characterized the circumstances as a "break and enter," which statements had not been adduced in the prosecution's case.

We skip directly to the prejudice prong of the incompetence analysis: regardless of what one thinks of counsel's inability to pierce the testimony of a straightforward percipient witness, defendant was not prejudiced by counsel's performance. Defendant was caught red-handed inside the residence, having bagged and stacked up salable electronic items and other property. The inability to shake Officer Jones's testimony, or the mere mention of some blood on a branch, or the characterization of (1) the smashed sliding glass door and (2) defendant's presence inside the residence, as a "break and enter," had little or no effect on the verdict, and certainly raises no doubts about the validity and fairness of the outcome.

D. Defendant's Argument That Counsel "Lacked Sincerity" in Asking the Court to Dismiss One or More of the Strike Priors Is Unfounded

After conviction, defense counsel presented a request to the trial court to exercise its discretion under Penal Code section 1385, pursuant to *Romero*,[10] to strike one or more of defendant's "strike" priors in the furtherance of justice. Concerning counsel's statement to the court that "the defendant wishes to pursue a *Romero* hearing," defendant makes the astonishing claim that "[i]t is almost axiomatic that when a defense counsel advises the court that 'the defendant' wishes to pursue a matter, the trial court concludes that the pursuit is without merit because the defendant, rather than his counsel, is zealous in having the matter brought before the court." We were entirely unaware of any such axiom, or that counsel's and the courts' telepathic powers were so acute. We reject out of hand defendant's assertion that "[t]he court's response [to counsel's argument] and imposition of sentence reflects [a] lack of sincerity" in making the request. The court's exercise of discretion not to strike any of defendant's "strike" priors was appropriate, given defendant's record. Likewise, his sentence was proper.

Defendant had suffered three serious or violent felony strike priors: (1) Number FWV00353, a March 4, 1993 conviction of attempted first degree burglary, committed on or about February 16, 1993; (2) Number FWV03941, a November 15, 1994 conviction of first degree burglary, committed on or about January 7, 1994;; and (3) Number KA021593,

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[10] *People* v. *Superior Court (Romero)* (1996) 13 Cal.4th 497.

a July 26, 1995 conviction of first degree burglary, committed on or about October 25, 1993. Besides his strike priors, defendant had also been convicted of felony auto theft (No. KA020804, conviction date Jan. 19, 1994) committed on or about January 13, 1994.

Defendant started committing crimes in 1993, and in less than 12 months had committed 4 separate offenses. Undaunted by a conviction in early 1993, he went on to commit further crimes. He served several terms in prison, and seemed to learn nothing from the experiences. As to the present offense, he had been released from prison for only ten days before committing yet another burglary. After so many acts of theft, it is not surprising that his "Persian Gulf War Syndrome" excuse wore thin. In short, defendant to all appearances has become a career thief, and is precisely the sort of person for whom the three strikes law was intended.

The trial court's refusal to strike one of defendant's strike priors, and its imposition of a three-strikes sentence, does not reflect on *counsel's* conduct (i.e., that counsel was insincere or less than zealous); rather, the outcome reflects a realistic and appropriate assessment of *defendant* and his own conduct.

Defendant has failed to show either that his trial counsel performed deficiently, or that he was prejudiced by counsel's alleged deficiencies. His claim of ineffective assistance of counsel fails.

III. Counsel's Absence at Reinstruction Does Not Require Reversal

Defendant next contends that his convictions must be reversed because defense counsel was denied the opportunity to be present when the jury was given further instructions on the prior conviction allegations. The contention is without merit.

At the bifurcated trial on defendant's prior convictions, the court asked counsel before deliberations commenced, "Is everybody going to be in their office?" Both counsel said that they would be in their respective offices. During deliberations, the jury requested to have "someone show us how to match the True or False statements to the past conviction files." The reporter's transcript indicates that the court answered the jury request, "in the jury deliberation room," and that "[t]he attorneys and defendant were not present, having previously waived their appearance."

Defendant now urges that his counsel's acknowledgment that he would be "in [his] office" was not a sufficiently explicit waiver of his presence, and that counsel was therefore deprived of the opportunity to be present at a critical stage of the proceedings. Defendant urges that, when counsel has not waived his or her presence at reinstruction, prejudice is presumed and reversal is required.[11]

Dagnino does not stand for a "prejudice per se" presumption; in fact, the *Dagnino* court expressly eschewed the notion that prejudice would be presumed as a matter of law.[12] Rather, the court held that prejudice would be presumed only, "where the denial [of counsel's presence] '*may have affected*' the substantial rights of the accused."[13] Defendant fails to point out any manner in which his substantial rights were affected. The court's response to the jury's request was simple and straightforward: Essentially, all the

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[11] *People v. Dagnino* (1978) 80 Cal.App.3d 981, 988-990.
[12] *People v. Dagnino*, *supra*, 80, Cal.App.3d 981, 989.
[13] *People v. Dagnino*, *supra*, 80, Cal.App.3d 981, 989, italics in original.

court told the jurors was that each verdict pertained to a particular prior charge, which could be identified by its case number. This answer was patently correct. Thus, even if "[o]nly the 'most compelling showing' . . . will suffice to overcome the presumption [of prejudice],"[14] that presumption was certainly dispelled here, when defendant can suggest no manner in which the court's response was incorrect or improper. While the *Dagnino* court found itself, under the circumstances there, "unable to declare a belief that the trial court's error in giving instructions to the jury, in the absence of defendants and their attorneys, was harmless beyond a reasonable doubt,"[15] we suffer no such inability. Beyond any doubt, the court's conduct here was harmless, under any standard of review.[16]

IV. Defendant's Conviction of Receiving Stolen Property Need Not Be Reversed

Defendant frames his next contention in terms of "insufficiency of the evidence" to support his *felony* conviction of receiving stolen property. The gravamen of his contention is that there was no proof that the stolen property in his possession -- i.e., the small radio in his backpack and the victim's credit cards in his pocket -- had a value of over $400, and that, unless the property he received was of at least that value, he could be convicted at most of a misdemeanor.

Defendant's contention is without merit. Penal Code section 496 defines the offense of receiving stolen property, and specifies that a person convicted of the crime may

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[14] *People v. Dagnino*, *supra*, 80 Cal.App.3d 981, 989.
[15] *People v. Dagnino*, *supra*, 80 Cal.App.3d 981, 990.

be punished by "imprisonment in a state prison, or in a county jail for not more than one year." This language indicates that the offense of receiving stolen property is a "wobbler," i.e., sometimes punished as a felony (imprisonment in a state prison), and sometimes as a misdemeanor (imprisonment in a county jail for not more than one year).

Penal Code section 496, subdivision (a), expressly provides that, "*if* the district attorney. . . determines that this action would be in the interests of justice, the district attorney . . . may, if the value of the property does not exceed four hundred dollars ($400), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year." In other words, if, and only if, the charging authority (i.e., the district attorney) determines that it would be in the interests of justice to have the matter charged exclusively as a misdemeanor, the charging authority is granted discretion to do so. The statute thus provides for *prosecutorial discretion* concerning the framing of the charge in the information. This discretion is not granted to the court, or to the jury, or to the defendant.

It is in the nature of a "wobbler" that some persons convicted of the crime may be ultimately punished as misdemeanants, while some may be ultimately punished as felons. Under Penal Code section 496, subdivision (a), this is true whether the stolen property received is valued at greater than $400, or less than $400. Penal Code section 496,

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16 *Chapman* v. *California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d

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subdivision (a), grants the district attorney the discretion to specify that the crime will be tried from the outset as a misdemeanor if, and only if, both (1) the property stolen is valued under $400, and (2) the interests of justice require. If no such specification is made, in the district attorney's discretion, then, like any other "wobbler," the charge is tried as a felony, and remains a felony unless, after conviction and at sentencing, the trial court expressly declares otherwise.[17]

The dollar value of the stolen property received is not an element of the crime of receiving stolen property;[18] the crime is generally charged as, and remains, a felony, even if the property is valued at under $400.

Upon conviction, it is the court, under Penal Code section 17, subdivision (b), which has discretion in imposing sentence. The court, not the jury, possesses the power to sentence a person convicted of a "wobbler" offense, as either a misdemeanant or a felon. Defendant was not entitled to have the jury decide the matter, and therefore was not entitled to instructions affording the *jury* the opportunity to characterize the ultimate conviction as a misdemeanor.

To the extent that defendant complains that the district attorney abused its prosecutorial discretion in declining to specify that the offense was a misdemeanor, we

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[17] *People v. Martinez* (1998) 62 Cal.App.4th 1454, 1465-1466.

[18] Cf. *People v. Fitzpatrick* (1889) 80 Cal. 538, 541.

perceive none. Nothing in defendant's circumstances, as a four-time convicted thief, demanded misdemeanor treatment "in the interests of justice."

Further, part of the property upon which the charge was based consisted of the victim's credit cards. Credit cards are virtual cash equivalents, and could readily and easily be converted to a wide variety of goods, in many different establishments. In his own eyes, if in no one else's, defendant saw the credit cards as highly valuable items. The prosecutor did not abuse his discretion in taking the same view for charging purposes.

The felony conviction of receiving stolen property was proper, regardless of the value of the property taken. There was no failure of evidence; the value of the property received is not an element of the crime. No reversal is required.

V. The Trial Court Properly Exercised Its Discretion in Declining to Strike a Serious Felony Prior Under *Romero*

Next, defendant contends that the trial court abused its discretion in refusing to strike one of his felony "strike" priors. Defendant seizes upon the court's remarks acknowledging that his crimes have not been marked by a history of violence, and that he does suffer from PTSD, but that that condition has not been treated.

Nonetheless, as previously noted, there was no abuse of discretion. Even if defendant genuinely suffers from untreated PTSD, and even if he acquired that syndrome through no fault of his own, neither the jury nor the court was required to believe that that mental disease, defect, or condition "caused" him to commit crimes, or negated his intent to steal, or deprived him of the knowledge that his criminal conduct was wrong.

That defendant may have served honorably in the military does not render his sentence for his later criminal acts "unjustifiable," or render the court's decision not to strike a prior conviction "disingenuous." It is defendant's argument, rather, which is disingenuous. As Dr. Lantz testified concerning PTSD, "when you've gone through these types of life-threatening situations [e.g., combat], you are much more reactive to *those types of things again*." Nothing about defendant's consistent commission of numerous theft crimes since he returned home from the Persian Gulf War suggests that he was in any way reexperiencing life-threatening combat each time that he decided to steal. He was granted some leniency with respect to his prior crimes: He was apparently out on bail or probation for his earliest offenses when he committed others. He was granted concurrent sentencing with respect to some of his earlier offenses. He has likewise learned nothing from incarceration, and committed the instant offense only 10 days after his release from prison. As a budding career criminal, he fits precisely within the "spirit" of the three strikes law. The court did not abuse its discretion in declining to strike any of defendant's "strike" priors, in furtherance of justice. It would, rather, have been an abuse of discretion to have done so.[19]

VI. Two of Defendant's One-Year Prior Prison Term Enhancements Should Be Stricken

Finally, defendant urges that, although he suffered four prior felony convictions, he did not serve a separate prison term with respect to two of them. Pursuant to Penal Code

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[19] *People v. Williams* (1998) 17 Cal.4th 148, 161.

section 667.5, subdivisions (b), (e), and (g), therefore, defendant should have been subject at most to two prior prison term enhancements.

The People urge that defendant failed to preserve this sentencing issue for appeal by failing to object below.[20] Defendant counters that, if his counsel failed to preserve the issue by objecting, he has a valid claim that his counsel rendered ineffective assistance with respect to sentencing.[21] The People frankly admit that, if we reach the merits of defendant's contention, he is entitled to a reduction of his sentence by two years.

To avoid further waste of the time and resources of the parties and the judiciary, we agree that defendant's prior prison term enhancements, imposed on account of his convictions in case number FWV03941 and case number KA021593, should be stricken.

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[20] *People* v. *Scott* (1994) 9 Cal.4th 331, 351-357.
[21] *People v. Wortman* (1992) 11 Cal.App.4th 650, 653.

DISPOSITION

The prior prison term enhancements imposed on account of defendant's prior convictions in case number FWV03941 and case number KA021593 are ordered stricken. We order that the abstract of judgment be amended to reflect a reduction of the indeterminate term to 37 years to life. The court shall forward a copy of the corrected abstract to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED

/s/ Ward
J.

We concur:

/s/ Richli
Acting P.J.

/s/ Gaut
J.